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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BERENICHE MARTIN, Plaintiff and Appellant, v. GENERAL DYNAMICS et al., Defendants and Respondents.	B205706 (Los Angeles County Super. Ct. No. BC343148)

APPEAL from a judgment of the Superior Court of Los Angeles County. Reginald A. Dunn, Judge. Affirmed.

Law Office of James A. Otto and James A. Otto for Plaintiff and Appellant.

Backus, Bland, Navarro & Weber, Charles N. Bland and Rebecca L. Gerome for Defendants and Respondents.

* * * * * *

Plaintiff and appellant Bereniche Martin appeals from a judgment following an order denying her motion to vacate an arbitration award and granting the motion of defendants and respondents Gulfstream Aerospace Corporation, Corliss Arch, Alice Rushdy and Larry Holifield (sometimes collectively Gulfsteam) to confirm the award. The arbitration resolved several claims she brought following her termination from Gulfstream's employment. Contrary to appellant's assertions, the arbitrator neither lacked subject matter jurisdiction to resolve nor exceeded his powers in resolving her claims. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Gulfstream Aerospace Corporation, a wholly-owned subsidiary of General Dynamics company, is engaged in the business of designing, manufacturing, selling and servicing high-end aircraft. Its principal place of business is in Savannah, Georgia, and it has several facilities throughout the United States and Mexico, including one in Long Beach, California where appellant was employed.

Appellant commenced her employment with Gulfstream in February 2000 as a senior interior designer. Her job functions included developing, presenting and acquiring customer approval of interior design packages; coordinating production release; supporting sales and marketing; working with the engineering, production and materials departments; providing drawing and renderings; and collaborating with internal departments and the customer to create a total design package for the $50 million airplanes manufactured by Gulfstream. In addition, appellant's job required her to be able to organize large projects, train junior designers and interact with customers both inside and outside the Gulfstream facility.

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[1] Many of the background facts relating to appellant's employment and injury are taken from the arbitrator's opinion and award dated September 25, 2007; the arbitrator's findings are nonreviewable and taken as correct. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 367, fn. 1.)

On October 20, 2001, appellant suffered an injury at work when she dropped a wood sample on her right foot. The next day, appellant initiated a workers' compensation claim. Appellant was able to return to work immediately with a modified work restriction that required her to wear an orthopedic shoe. By October 23, 2001, appellant was deemed able to return to full duty. But on November 20, 2001 appellant's physician examined her foot and determined its condition had worsened. Roy Damser, M.D., to whom appellant had been referred by her physician, diagnosed appellant with chronic post traumatic pain syndrome to her right foot or reflex sympathetic dystrophy (RSD). On January 16, 2002, Dr. Damser opined that appellant had a temporary partial disability and could work under a restriction of five hours per day for the next thirty days. On January 21, 2002, he modified the work restriction to a maximum of 20 hours per week. Approximately 10 days later, Dr. Damser and Michael Mahdad, M.D., opined that appellant's condition was continuing to worsen, stating that appellant could not stand at work and that she was partially disabled with a restriction of no standing or walking for at least one month.

Appellant's last day at work was February 4, 2002. Gulfstream approved her for a two-month leave of absence. Appellant extended her leave to July 1, 2002 per her doctor's recommendation. Gulfstream classified appellant as temporarily disabled between June 2002 and January 2003. In August 2002, Gulfstream's benefits administrator Corliss Arch (Arch) completed and submitted appellant's disability claim to UNUM Provident, Gulfstream's disability insurer, and appellant's supervisor thereafter provided supporting documentation. On November 22, 2002, UNUM Provident rejected the claim, determining that appellant's injury did not preclude appellant from performing the material and substantial duties of her job. Appellant immediately sent a copy of the rejection notice to Arch, who discussed the denial with Stacy Pickard (Pickard) at Gulfstream's corporate headquarters. Pickard determined that Arch should appeal UNUM Provident's decision by submitting a more detailed job analysis and a doctor's more specific job restrictions.

On January 10, 2003, Dr. Mahdad submitted a report containing a reevaluation of appellant's condition which indicated that appellant had ankle pain when she walked up or down stairs and that her foot became purplish even when down for only a minute. In a January 2003 e-mail to Arch, Pickard indicated that Gulfstream should continue to help appellant through the insurance appeal process, and that appellant's job analysis should be updated as part of that assistance. Gulfstream instructed appellant how to challenge UNUM Provident's denial of her claim, in part by having appellant explain to UNUM Provident and her doctors that the physical demands of the job made it impossible for her to perform.

In a January 24, 2003 e-mail from appellant to UNUM Provident, appellant raised a number of points about her condition, including: "1. 'My job requires me to be on my feet most of the day'; [¶] 2. 'I have to carry wood samples through entire hangers which are more than 1000 feet'; [¶] 3. 'As for my current condition, since February 2002, most of the time I stayed in bed with my foot and leg up in pillows'; [¶] 4. 'Standing today is limited to probably 5 minutes at the time having most of my weight on my left foot'; [¶] 5. 'I stand with my right foot for about 10 seconds three times a day . . . causing me to spend the rest of the day in bed. It is just too hard.'" In February 2003, Arch also communicated with UNUM Provident, providing an updated job analysis describing appellant's job's physical requirements. Appellant saw the communication and did not disagree with it. As of February 7, 2003, Dr. Mahdad continued to classify appellant as temporarily totally disabled. In May 2003, UNUM Provident reversed its decision to deny benefits to appellant.

By July 2003, appellant's physical condition had deteriorated; Dr. Mahdad confirmed that appellant was suffering from physical and emotional depression and that her condition was not improving. Approximately six months later, on January 23, 2004, Dr. Mahdad prepared a final evaluation which confirmed that appellant needed crutches to walk, had to keep weight off of her right foot, and had "'increased and intense pain.'" He indicated that appellant could not perform any job that required walking or standing for more than a few minutes, and she would need to keep her leg elevated most of the

time while sitting. Finally, Dr. Mahdad wrote: "'She [appellant] will not be able to return to her occupation as a Senior Interior Designer because she will not be able to ascend and descend steps into or out of airplanes or inside airplanes in any functional manner.'" Coastline Podiatry Group concurred with Dr. Mahdad's diagnosis, and appellant herself told Arch that she did not want to risk doing anything contrary to Dr. Mahdad's instructions, recognizing that "'my ability to work is and has been very limited specially [*sic*] knowing how active my profession and position is.'"

In October 2004, Gulfstream settled appellant's workers' compensation claim by payment of $100,000 in exchange for a compromise and release. Gulfstream notified appellant of her termination from employment on November 9, 2004. During appellant's exit interview, she stated that she had been treated fairly and neither requested to return to work nor inquired about any accommodations that could be made to enable her to return to work.

In November 2005, appellant filed her complaint for damages and injunctive relief, alleging causes of action for violation of Government Code section 12940 in the form of retaliation, disability discrimination, failure to reasonably accommodate, failure to engage in the interactive process and failure to take steps to prevent discrimination, and for employment termination in violation of public policy. Gulfstream answered, generally denying the allegations and asserting multiple affirmative defenses.

Gulfstream moved to compel arbitration in April 2006. It brought the motion on the basis of its dispute resolution policy (DRP) which went into effect on August 1, 2002. The DRP provided a structured resolution process of specified employment-related claims, including claims for employment discrimination and claims relating to workplace accommodation for physical or mental disabilities. The DRP outlined multiple levels of review, concluding with arbitration and stating: "An outside arbitrator provides the Employee and the Company with a decision on the Covered Claim. The Arbitrator's decision is the exclusive remedy for Covered Claims and is final and binding on the Company and Employee." The DRP further outlined the arbitration process in detail and provided that all parties waived their right to a jury trial on the claims covered by the

DRP. Though Gulfstream provided its employees with the opportunity to opt out of the DRP, appellant did not do so. Employee records showed that Gulfstream had mailed a copy of the DRP to appellant at the last address she had provided and that she did not elect to opt out of the DRP within 30 days thereafter.

Appellant opposed the motion on the grounds that she never received a copy of the DRP and would not have agreed to its terms if she had, the DRP's arbitration provision was unconscionable and the petition to compel was untimely. By order dated May 23, 2006, the trial court granted the motion to compel arbitration and stayed the civil action, ruling that appellant was required to submit her claims to binding arbitration pursuant to the DRP.

In June 2006, appellant commenced arbitration proceedings before the American Arbitration Association (AAA). Following completion of discovery, the arbitration hearing took place between July 24 and July 27, 2007, at which time the parties presented evidence, examined and cross-examined witnesses and provided briefing. During the course of the arbitration proceedings, the arbitrator denied appellant's motion asserting that the arbitrator had no jurisdictional authority to render a decision. The arbitrator issued his opinion and award on September 25, 2007.

The arbitrator rejected appellant's claim that she was terminated in retaliation for filing a workers' compensation claim, stating: "Plaintiff was terminated because Plaintiff and her doctors had convinced GAC [Gulfstream] that she could no longer perform her duties as a Senior Designer. Plaintiff told this to GAC in numerous e-mails. Her doctors declared her temporarily totally disabled. Plaintiff created her own record saying she was totally disabled and not capable of performing the essential duties of her job. Later, before her termination, Plaintiff's treating physicians determined her to be <u>permanently total disabled,</u> and could not return to her job." The arbitrator likewise rejected appellant's claim that Gulfstream failed to communicate with her about her disability or alternate employment, finding there was a comprehensive record of direct communication between the parties which did not include any request by appellant for employment other than the senior interior designer position.

The arbitrator found no merit to appellant's reasonable accommodation claim. Though Gulfstream initially accommodated appellant by permitting her to wear an orthopedic boot, the evidence showed that appellant could not perform her job with any type of accommodation once her condition deteriorated. The arbitrator found that neither of the accommodations suggested by appellant—a motorized cart or an assistant—would have been feasible for multiple reasons.

Finally, the arbitrator concluded there was no evidence that appellant had been discriminated against because of her physical condition or her filing a workers' compensation claim. The arbitrator entered judgment against appellant on all causes of action and ordered Gulfstream to bear all fees and expenses.

In October 2007, Gulfstream moved to confirm the arbitration award and, in November 2007, appellant moved to vacate the award. In the motion to vacate, appellant asserted that the arbitrator exceeded his power because her last day of work preceded the creation of the agreement to arbitrate, he failed and refused to provide discovery and he ignored undisputed evidence supporting her claims. Simultaneously, appellant filed her opposition to the petition to confirm the award on the grounds raised in her motion to vacate.

Following a December 14, 2007 hearing, the trial court granted Gulfstream's petition to confirm the arbitration award. It ruled that appellant failed to show the arbitrator exceeded his powers or lacked jurisdiction. Thereafter, it entered judgment in favor of Gulfstream. This appeal followed.

DISCUSSION

Appellant contends that the arbitration award should not have been confirmed for two overarching reasons. First, she claims the arbitrator lacked subject matter jurisdiction because any agreement to arbitrate contained in the DRP was created after her employment with Gulfstream had terminated. Second, she claims the arbitrator exceeded his authority. She cites several actions in support of this claim, including that he refused to permit discovery, denied her request for a court reporter, ignored

undisputed facts and declined to follow the law. To the extent we can consider appellant's contentions given the limited nature of our review of an arbitration award, we conclude they lack merit.

I. General Arbitration Principles and Standard of Review.

California maintains a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. [Citations.]" (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322.) Because of this important public policy, arbitration awards are subject to extremely narrow judicial review. Courts will not review the merits of the controversy, the validity of the arbitrator's reasoning or the sufficiency of the evidence supporting the arbitrator's award. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 (*Moncharsh*); accord, *Luster v. Collins* (1993) 15 Cal.App.4th 1338, 1344–1345.)

As the court in *Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184 recently summarized: "When parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision. [Citations.] Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for '"[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement."' [Citation.]" (Accord, *Moncharsh, supra* 3 Cal.4th at p. 12 ["'it is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible'"].) Moreover, consistent with the fundamental nature of the arbitration process, arbitrators may apply both legal and equitable principles and, unless specifically required to act in conformity with the rules of law, may act contrary to substantive law

and base their decisions upon broad principles of justice and equity. (*Id.* at pp. 10–11; *Sapp v. Barenfeld* (1949) 34 Cal.2d 515, 523; *Woodard v. Southern Cal. Permanente Medical Group* (1985) 171 Cal.App.3d 656, 662.) "The entire statutory arbitration scheme is designed to give the arbitrator the broadest possible powers." (*Marcus v. Superior Court* (1977) 75 Cal.App.3d 204, 210.)

The exclusive grounds for vacating an arbitration award are those specified in Code of Civil Procedure section 1286.2.[2] (*Moncharsh, supra,* 3 Cal.4th at p. 10; *Luster v. Collins, supra,* 15 Cal.App.4th at p. 1345.) An arbitration award generally may not be overturned simply because a court believes that the arbitrators committed legal or factual error, even if that error causes a substantial injustice. (*Moncharsh, supra,* at pp. 27–28.) An arbitrator does not exceed his powers within the meaning of section 1286.2 erroneously resolving a legal or factual issue "so long as the issue was within the scope of the controversy submitted to the arbitrators." (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.)

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[2] Code of Civil Procedure section 1286.2 provides: "(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following: [¶] (1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. . . ."

Unless otherwise indicated, further statutory references are to the Code of Civil Procedure.

"[I]n reviewing a judgment confirming an arbitration award, we must accept the trial court's findings of fact if substantial evidence supports them, and we must draw every reasonable inference to support the award. [Citation.] On issues concerning whether the arbitrator exceeded his powers, we review the trial court's decision de novo, but we must give substantial deference to the arbitrator's own assessment of his contractual authority. [Citations.]" (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1087; accord, *Advanced Micro Devices, Inc. v. Intel Corp., supra,* 9 Cal.4th at p. 376, fn. 9; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 23–24.)

II. Substantial Evidence Supported the Trial Court's Conclusion There Was a Valid Agreement to Arbitrate.

In May 2006, the trial court granted Gulfstream's motion to compel arbitration pursuant to the terms of the DRP. During the course of arbitration, the arbitrator also denied appellant's motion seeking a ruling that he had no jurisdiction to rule on her claims. On appeal, appellant renews her contention that arbitration should not have been compelled in the first instance because her employment terminated before the creation of the DRP and, alternatively, because she never received a copy of the DRP and thus never assented to its terms. (See, e.g., *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 329 ["If a trial court compels arbitration nonetheless, the party resisting arbitration may seek review of the ruling on appeal from an order that confirms the award"].) We find no basis to disturb the order compelling arbitration.

The right to arbitration is based on contract principles and "a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) In ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues relating to the threshold issue of arbitrability, i.e., whether, under the facts before the court, the contract excludes the dispute from its arbitration clause or includes the issue within that clause. [Citations.] Parties may submit declarations when factual issues are tendered with a motion to compel arbitration.

[Citation.]" (*Ibid.*) We apply the substantial evidence test to the trial court's ruling when it is based on conflicting evidence: "'We must accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence. [Citation.]' [Citation.] This court likewise subjects the trial court's factual ruling on arbitrability to the substantial evidence test. [Citation.]" (*Ibid.*)

In opposition to the motion to compel arbitration, appellant never contended that she was not employed by Gulfstream in August 2002 when the DRP became effective. Rather, she characterized herself as being capable of returning to work with accommodations. In her opposition to confirm the arbitration award, appellant declared that she was effectively terminated on September 1, 2002.[3] In support of the motion to compel arbitration, Gulfstream offered evidence in the form of appellant's termination letter which stated that her employment was terminated effective November 15, 2004. In connection with the petition to confirm the arbitration award, Gulfstream offered the arbitrator's award itself, where the arbitrator ruled that appellant was terminated in November 2004. Thus, not merely substantial but undisputed evidence established that appellant was employed by Gulfstream when the DRP went into effect.

In support of her contention that she should not be bound by the DRP because she never received it, appellant declared in opposition to the motion to compel arbitration that "I never received any type of correspondence from the defendants regarding arbitration. I never received any verbal communication from the defendants regarding arbitration. I never received any written correspondence from the defendants regarding arbitration." Appellant's declaration in opposition to the petition to confirm the award likewise averred that she never received an arbitration agreement from Gulfstream during her

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[3] Appellant made this argument in an effort to show that her employment had terminated before April 10, 2003, the date a revised version of the DRP went into effect. Any revisions, however, had no bearing on appellant's claims.

employment. Gulfstream, on the other hand, offered the declaration of its former human resources director, James Sanders, who stated that on or about July 15, 2002, he mailed a copy of the DRP to each Gulfstream employee at the last address provided by the employee. Appellant was among that group. Together with the DRP, he mailed a letter to each employee explaining the process for opting out of the DRP; his records showed that Gulfstream never received correspondence from appellant exercising her ability to opt out of the DRP.

When the court decides an issue, as trier of fact, based upon conflicting evidence or declarations, the decision must be upheld if it is supported by substantial evidence. (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923; *Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1170–1171, fn. 1.) Here, substantial evidence supported the trial court's conclusion that appellant was bound by the provisions of the DRP. Beyond asking us to reweigh the facts, appellant contends only that the arbitrator erred by refusing to allow testimony concerning appellant's receipt of the DRP. But the question of whether there is a valid agreement to arbitrate is one for the trial court, not the arbitrator. (E.g., *Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819, 824 ["when the trial court reviews a petition to compel arbitration, the threshold question is whether there is an agreement to arbitrate"]; *Pagett v. Hawaiian Ins. Co.* (1975) 45 Cal.App.3d 620, 622 ["the existence of an agreement to arbitrate the controversy is also a preliminary question to be determined by the court before an order compelling arbitration can be made"].) In granting Gulfstream's motion to compel arbitration, the trial court necessarily determined that the DRP constituted a valid agreement to arbitrate between Gulfstream and appellant. (See *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420 [an employee's acceptance of an agreement to arbitrate may be express or implied in fact].) The arbitrator properly declined to receive the same evidence that formed the basis for the trial court's determination.

III. Substantial Evidence Supported the Trial Court's Conclusion that the Arbitrator Did Not Exceed His Powers.

Appellant's remaining contention is that the arbitrator exceeded his powers both in terms of the procedures employed during the arbitration and the result reached. (See § 1286.2, subd. (a)(4).) She asserts that "particular scrutiny" of the arbitration award is mandated because her claims involved certain civil rights under the Fair Employment and Housing Act (FEHA). (See Gov. Code, § 12900 et seq.)

Our Supreme Court has held that where an arbitration agreement implicates unwaivable statutory rights, such as those under the FEHA, the agreement must be subjected to particular scrutiny. (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 100 (*Armendariz*).) To be enforceable, an arbitration agreement involving such public rights must comply with certain "minimum requirements." (*Id.* at p. 113.) An enforceable arbitration agreement must include the following procedural requirements: (1) neutral arbitrators; (2) more than minimal discovery; (3) a written award; (4) the availability of all the types of relief that would otherwise be available in court; and (5) a requirement that employees not pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. (*Id*. at p. 102.) The arbitration agreement must also contain "'a modicum of bilaterality,'" which would be lacking if the agreement required arbitration of claims only that an employee would be most likely to bring. (*Id.* at p. 119; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114–115.)

The DRP satisfied these requirements, providing for the selection of a neutral arbitrator, a process for the exchange of specified discovery, the requirement that the arbitrator issue a written opinion, a provision stating that the arbitrator has the authority to grant any remedy or relief which would have been available if the claim had been asserted in court; and a provision requiring the employer to pay the costs and fees associated with the arbitration, exclusive of a $100 filing fee. Appellant complains that the process employed by the arbitrator failed to comport with the minimum requirements to the extent that discovery was too limited and there was no court reporter.

It is important to note that "arbitration proceedings are *not* governed by the rules of evidence or judicial procedures applicable to superior court trials, unless the arbitration agreement provides otherwise. (§ 1282.2, subd. (d).)" (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 908.) *Armendariz* held that employees arbitrating claims under the FEHA "are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review pursuant to Code of Civil Procedure section 1286.2." (*Armendariz, supra,* 24 Cal.4th at p. 106.) The arbitrator must balance this entitlement, however, against the limitations on discovery which foster arbitration's goals of simplicity, informality and expediency. (*Id.* at pp. 105–106 & fn. 11.) Thus, "'adequate' discovery does not mean unfettered discovery . . . ." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 184.)

Here, the arbitrator's order on appellant's and Gulfstream's motions to compel discovery indicates that each party was afforded the opportunity to propound form interrogatories, special interrogatories and a request for production of documents, and to take the depositions of parties to the action. The arbitrator's order provided for adequate discovery. (E.g., *Martinez v. Master Protection Corp., supra,* 118 Cal.App.4th at pp. 118–119 [arbitration agreement restricting each side to one deposition and one request for production of documents held to provide for adequate discovery]; *Mercuro v. Superior Court, supra,* 96 Cal.App.4th at pp. 182–184 [arbitration agreement restricting each side to three depositions and a maximum of thirty written discovery requests of any kind, including subparts, held to provide for adequate discovery].)

Appellant further complains that the arbitration was procedurally deficient because the arbitrator denied her requests for a court reporter and the DRP required her to pay for the costs of a court reporter. The pertinent DRP provision stated: "Either party may arrange for a qualified court reporter to make a stenographic record and transcript of the arbitration hearing. If only one party requests that a record be made, then that party shall pay for the entire cost of the record. If both parties want access to the record, the parties shall share the cost equally. In the event one or both parties request access to the

transcript, an additional copy shall be provided to the Arbitrator at the expense of the requesting party or parties." In the arbitration award, the arbitrator directly addressed appellant's contention in her closing brief that she was denied a court reporter free of charge. The arbitrator wrote that appellant's contention was contradicted by the record of the case management conference, at which time appellant stated that she intended to provide for a court reporter at the hearing. The arbitrator further wrote: "[T]he AAA Rules provide that any party desiring a stenographic record of any proceeding shall make the arrangements directly with the stenographer and shall notify the other parties of these arrangements. The Arbitrator never denied any request for a court reporter nor is there any record of such a request by any party to these proceedings." Accepting as true the arbitrator's recitation of the events surrounding appellant's desire for a court reporter (*Advanced Micro Devices, Inc. v. Intel Corp., supra,* 9 Cal.4th at p. 367, fn. 1), appellant's claim fails. The arbitrator never denied her request for a court reporter and, by failing to raise the issue before the arbitrator, appellant waived any challenge to the DRP's requirement that the requesting party bear the cost of a court reporter. (*Moncharsh, supra,* 3 Cal.4th at p. 30 [legality of arbitration agreement's fee-splitting provision was a question for the arbitrator in the first instance; court refused to "permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the illegality issue in a motion to vacate the arbitrator's award"].)

Beyond procedural errors, the majority of appellant's arguments in support of her claim that the arbitrator exceeded his powers focus on his findings of fact and law. She contends that he ignored undisputed facts and failed to follow the law. As recently reiterated by the Supreme Court, "[a]bsent an express and unambiguous limitation in the contract [for arbitration] or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation." (*Gueyffier v. Ann Summers, Ltd., supra,* 43 Cal.4th at p. 1182.) The *Gueyffier* court went on to explain that inherent in that authority "is the possibility the arbitrator may err in deciding some aspect of the case.

Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for '"[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement."' [Citation.]" (*Id*. at p. 1184; accord, *Moncharsh, supra,* 3 Cal.4th at p. 28 ["It is well settled that 'arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision'"].)

Notwithstanding the general rule of nonreviewability, appellant seeks review of the arbitrator's findings under *Armendariz*, where the court acknowledged that "judicial review may be appropriate when 'granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights.' [Citations.]" (*Armendariz, supra,* 24 Cal.4th at p. 106.) Accordingly, the court held "that in order for such judicial review to be successfully accomplished, an arbitrator in an FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based." (*Id*. at p. 107.) The arbitrator here complied with that directive, and we find nothing in the arbitration award that is inconsistent with appellant's rights under the FEHA or the Labor Code.

Appellant asserts that the arbitrator failed to protect her rights under the FEHA by declining to find that Gulfstream had failed to explore with her and/or offer a reasonable accommodation. Government Code section 12940 provides in relevant part: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification . . . . [¶] . . . [¶] (m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee [unless accommodation would produce undue hardship to the employer's operation] . . . . [¶] (n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

Contrary to appellant's assertion, the arbitrator did not ignore undisputed evidence, but rather, based his decision on his review of the evidence presented.[4] The arbitrator rejected appellant's reasonable accommodation claim on the ground that Gulfstream did accommodate her by permitting her to work with an orthopedic boot while she was still able. He found the evidence showed that appellant would not have been able to perform her job with the other proposed accommodations. (See *Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 242 ["The FEHA 'does not prohibit an employer from . . . discharging an employee with a physical or mental disability, . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations . . . .' (§ 12940, subd. (a)(1).) The term 'reasonable accommodation' includes '[j]ob restructuring, . . . reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities.' (§ 12926, subd. (n)(2))"].) The arbitrator ruled that a motorized cart would not have assisted appellant, as she admitted she drove with her right foot. He further ruled that permitting appellant to drive a motorized cart with her foot elevated and in chronic pain would pose a safety risk to appellant and other employees, and would ignore the risk of economic loss potentially caused by appellant's possibly running into planes or equipment. The arbitrator further ruled that the evidence showed providing appellant with a full-time assistant to take photographs of design work in progress would not permit her to perform her duties as "[t]he time it would take to communicate with an assistant, take pictures, evaluate the pictures, etc. would slow down the operation and create the potential for numerous errors and mistakes which would further delay the delivery of the aircraft to the client." Finally, the arbitrator found the undisputed evidence showed there were no comparable jobs available at the time appellant was terminated.

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4 Indeed, the arbitrator was presented with many of the arguments appellant has made on appeal and commented in the award that "[p]laintiff was represented by a zealous attorney who has carefully attempted to construct a web of facts which unfortunately ignores the procedural and evidentiary facts in this case."

The arbitrator likewise addressed appellant's assertion that Gulfstream violated Labor Code section 132a by terminating appellant because she filed a workers' compensation claim. (See *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 824 [Labor Code section 132a "explicitly provides that '[a]ny employer who discharges, or threatens to discharge' an employee for filing an application for or receiving workers' compensation benefits commits a misdemeanor and is subject to severe penalties. A discharge in violation of section 132a likewise may support a cause of action for wrongful termination"].) Appellant's termination letter stated that Gulfstream had been advised appellant's workers' compensation claim had been settled in October 2004 and she had received payment, and further stated that her employment was therefore terminated effective November 15, 2004. Addressing the effect of this letter, the arbitrator ruled: "The termination letter in and of itself does not state that Plaintiff was terminated because she made a Workers Compensation Claim. The letter simply and inartfully states that Plaintiff's Workers Compensation Claim has settled, and her employment with Gulfstream was terminated. [¶] The letter by itself merely indicates that now that all benefits have been processed and received by Plaintiff, there was no longer any reason for the company to retain her services as an employee. The letter coupled with the testimony of Arch and others in the company does not support Plaintiff's contention that she was simply fired on November 15, 2004 because she filed a Workers Compensation Claim on October 22, 2001." Rather, the arbitrator determined that the evidence established "Plaintiff was terminated because Plaintiff and her doctors had convinced GAC that she could no longer perform her duties as a Senior Designer." We discern no violation of appellant's statutory rights by reason of the arbitrator's rejection of her wrongful termination claim premised on Labor Code section 132a. (See *Jordan v. Workers' Comp. Appeals Bd.* (1985) 175 Cal.App.3d 162, 166 [no wrongful termination or discrimination where employee not physically able to perform regular job].)

Because the arbitrator resolved appellant's claims in accordance with the DRP and did not exceed his powers in violation of section 1286.2, the trial court properly confirmed the arbitration award.

DISPOSITION

The judgment is affirmed. Gulfstream is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST